

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2000-

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In the Matter of  
Administrative Civil Liability Complaint No. 262.5-13  
**JOHN B. GLADSTEIN**

SOURCES: An Unnamed Stream tributary to Franz Creek thence Maacama Creek thence Russian River

COUNTY: Sonoma

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**ORDER IMPOSING ADMINISTRATIVE CIVIL LIABILITY**

**1.0 INTRODUCTION**

The Executive Director of the State Water Resources Control Board (SWRCB) issued Administrative Civil Liability (ACL) Complaint No. 262.5-13 on May 6, 1999, pursuant to Water Code section 1055(a), against Mr. John B. Gladstein in the amount of \$500. The complaint was issued for the illegal diversion of water to storage at a reservoir located on his property (Sonoma County Assessor's Parcel Number (APN) 120-200-029). By letter dated May 25, 1999,

Mr. Gladstein expressed his intention to appeal the proposed civil liability specified in the ACL complaint. The SWRCB conducted a hearing on the matter in accordance with Water Code section 1055 on May 9, 2000. Staff of the SWRCB's Division of Water Rights (Division) presented testimony and other evidence supporting adoption of the proposed order. Mr. Gladstein presented testimony and argument opposing imposition of civil liability. The SWRCB's findings are set forth below.

**2.0 BACKGROUND**

The unauthorized diversion or use of water subject to appropriation under the provisions of the Water Code is a trespass for which civil liability may be imposed in an amount not to exceed

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\$500 for each day in which the trespass occurs. (Water Code section 1052.) Water Code section 1825 provides:

“It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water.” (emphasis added).

## **2.1 WATERSHED INVESTIGATION PROGRAM**

In 1998, the Division initiated a pilot watershed investigation program to determine the extent to which illegal reservoirs are a problem in three high resource-value watersheds. The watersheds selected for the investigation were: (1) Maacama Creek in Sonoma County, (2) Navarro River in Mendocino County, and (3) Pescadero Creek in San Mateo County. The program focused on investigation of reservoirs which are shown on United States Geological Survey maps or on available aerial photographs and for which the Division has no record of an existing water right. The Division sent letters to the owner of each identified reservoir and asked the owner to identify the basis of the water right for the reservoir, explain why the reservoir is not subject to the SWRCB’s permitting authority, file a new water right application, or render the reservoir incapable of storing water.

Within the Maacama Creek watershed, Division staff initially identified 73 sites, of which 64 had reservoirs with no known water rights. Some reservoir owners filed water right applications for 19 of these facilities without requesting a field investigation. Owners of 39 of the reservoirs requested site inspections to determine if a water right permit was required; 6 reservoirs were not inspected but enforcement action was initiated as noted below. Following the inspections, Division staff determined that water right permits were not required for 16 of the inspected facilities; new applications were filed for 18 of the inspected facilities without further action; two

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reservoirs were subsequently removed; and 3 ACL complaints were issued against the remaining 3 inspected facilities. A fourth ACL complaint was issued against an owner of 6 facilities that were not inspected. The ACL complaints against the 6 uninspected facilities and one inspected facility were closed because the owners paid the proposed administrative civil liability of \$500 and filed new water right applications. Mr. Gladstein's reservoir is the only remaining facility identified in the Maacama Creek watershed investigation for which a water right application is required, and one of two facilities for which administrative civil liability has been proposed but not paid.

## **2.2 CORRESPONDENCE AND FIELD INSPECTION OF MR. GLADSTEIN'S RESERVOIR**

By letter dated July 27, 1998, Division staff informed Mr. Gladstein that the Division had no record of an existing water right authorizing the storage of water in a reservoir located on his property. Mr. Gladstein did not respond to the Division's request to identify the basis of his water right or file a water right application. On December 2, 1998, Division staff conducted a field inspection of Mr. Gladstein's reservoir to determine if it was subject to the permitting authority of the SWRCB. Staff found an existing reservoir with an approximate capacity of 19 acre-feet created by an earthen dam. Staff observed a small channel with bed and banks upstream of the reservoir that was flowing into the reservoir at the time of the inspection. Division staff estimates that the 2.7-acre watershed above the reservoir produces an average annual runoff of 7 acre-feet. Heavy vegetation below the dam obscured the view and access to the downstream channel. The 1993 Mark West Springs Quadrangle map published by the United States Geological Survey shows topography that is consistent with a downstream channel below the dam to Franz Creek.

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The Division sent a letter dated February 24, 1999, by certified mail, informing Mr. Gladstein that his reservoir constitutes an unauthorized diversion that would be subject to enforcement action without further notice, unless rendered incapable of storing water, or unless an application for a permit to appropriate water was filed within 30 days. Division records show that this certified letter was accepted at Mr. Gladstein's residence on March 8, 1999. Division staff telephoned Mr. Gladstein on April 2, 1999, because no response to the letter had been received. At that time Mr. Gladstein stated that he did not recall receiving the certified letter and requested that a copy be mailed to him. A copy of the letter and of the certification card of receipt, along with a water right application package was resent. The Division did not receive a reply from Mr. Galdstein. On May 6, 1999, ACL Complaint No. 262.5-13 was issued against Mr. Gladstein.

### **3.0 SWRCB CONCLUSIONS REGARDING CIVIL LIABILITY**

The reservoir located within NW1/4 of the NW1/4 of Section 4, T8N, R7W, MDB&M on Sonoma County APN 120-200-029 is storing water subject to the permitting authority of the SWRCB. This diversion of water to storage without an appropriative water right permit is an unauthorized diversion of water and a trespass against the State subject to administrative civil liability under Water Code section 1052 et seq. Water Code section 1055.3 provides:

“In determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.”

In this case, the fact that the dam forming the reservoir was apparently build by a prior owner of the property does not exempt Mr. Gladstein from applying for a water right permit for the continued presence of the reservoir on his property. Following notification of the violation, Mr. Gladstein has not taken any action to correct the violation, despite warning of potential

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enforcement action after the Division's field inspection. Even after issuance of the ACL complaint, Mr. Gladstein failed to file an application to obtain a water right for the reservoir.

The unnamed stream on which Mr. Gladstein's dam is located contributes seasonal flows to the Maacama Creek watershed that supports steelhead trout which are listed as threatened under the Federal Endangered Species Act. Division staff has not investigated the environmental damage, if any, caused by this unauthorized diversion, but would be expected to review potential environmental impacts as part of processing of a new water right application.

The costs associated with issuance of the ACL complaint, including writing letters and conducting the field inspection are in excess of the \$500 liability proposed in the ACL complaint. The SWRCB has incurred additional costs in preparing a hearing notice and scheduling a hearing in response to Mr. Gladstein's request. Enforcement costs would have been much less if Mr. Gladstein had filed an application to appropriate water when first contacted by the Division. Although the filing of an application would not bring Mr. Gladstein into compliance with the law unless and until a permit is issued or the reservoir is rendered incapable of storing water, filing an application would be a first step toward necessary corrective action. Adoption of an order imposing civil liability in the amount of \$500 as proposed in ACL Complaint No 262.5-13 is well-supported by the record.<sup>1</sup>

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<sup>1</sup> The record before the SWRCB would support administrative civil liability in excess of \$500. In view of the fact that the reservoir apparently was built prior to Mr. Goldstein's acquisition of the property, and in the absence of evidence of harm to the environment or other water users, this order imposes liability in the amount of \$500. However, failure to comply with this order may result in imposition of additional civil liability.

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**ORDER**

IT IS HEREBY ORDERED, based upon the foregoing findings, that:

1. John B. Gladstein is liable for administrative civil liability in the amount of \$500 and shall remit payment of the \$500 liability within 10 days of the date of this order;
2. Mr. Gladstein shall file, within 30 days of the date of this order, a water right application for the storage reservoir located on his property; and
3. Failure to remit the \$500 and to submit the water right application within the periods specified above will be cause for additional civil liability.

**CERTIFICATION**

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on \_\_\_\_\_.

AYE:

NO:

ABSENT:

ABSTAIN:

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Maureen Marché  
Administrative Assistant to the Board